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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,373	03/09/2004	Alain Leas	88265-74701	4476
28765 7590 01/29/2007 WINSTON & STRAWN LLP PATENT DEPARTMENT 1700 K STREET, N.W. WASHINGTON, DC 20006			EXAMINER THAKUR, VIREN A	
			ART UNIT	PAPER NUMBER
			1761	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/797,373

Applicant(s)

LEAS ET AL.

Examiner

Viren Thakur

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 December 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4, 8-10 and 25-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 8-10 and 25-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
- Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on December 15, 2006 has been entered.

### ***Response to Amendment***

2. As a result of the amendment to instant claim 1, the rejection of claims 1-4,8-10,25,26,28,30,32 under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 623324 B1) in view of Kuehl et al. (US EP 0848910 A2) has been withdrawn.

### ***Claim Rejections - 35 USC § 112***

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The instant claim recites "a packaging sleeve for protecting all or part of the outer surface of the shell" and subsequently recites "...and the entire outer surface of the shell is in complete surface-to-surface contact with the packaging sleeve." These limitations contradict each other since it is not clear as to how a packaging sleeve can protect part of the outer surface of the shell and also be in complete surface-to-surface contact with the shell.

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
7. Claims 1-4,8-10,25,26,29-30,32 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 6235324) in view of Kuehl et al. (EP 0848910 A2) and in further view of Damato (EP 276333), as cited in the previous Office Action, mailed December 7, 2005.
8. Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 6235324) in view of Kuehl et al. (EP 0848910 A2) and Damato (EP 276333), as applied to claims 1-4,8-10,25,26,29-30,32 and 33, above, and in further view of Tanaka et al. (JP2000-118590), for the reasons cited in the prior Office Action, mailed December 7, 2005.

Luigi Grigoli et al. teach packaging the ice cream filled in a cone in a paper sleeve with a lid (See Figures and column 2, lines 56-61), but is silent in teaching the ice cream extends over the cone and contacts the sleeve as recited in claim 27.

Tanaka et al. also teach ice cream in cones of a similar shape in paper packages (See Abstract and Figure 3). Tanaka et al. teach that in the prior art one eats ice cream either from a cup with a spoon or from a cone. However, Tanaka et al. teach a cone package design that offers the advantage of consuming the upper portion of the cone via spoon and then consuming the

lower portion as a conventional ice cream cone wherein the upper portion includes ice cream that is above the cone and in contact with the package as recited in claim 27 (Abstract, paragraph 1-14, figures 2 and 5 in light of figure 3). Therefore, it would have been obvious to further modify Grigoli et al. and include ice cream that is above the cone and in contact with the package since this Tanaka et al. teach this offers the benefit of allowing the consumer to eat the first portion via a spoon and the remaining portion as a conventional cone.

9. Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Luigi Grigoli et al. (US 6235324) in view of Kuehl et al. (EP 0848910 A2) and Damato (EP 276333), as applied to claims 1-4, 8-10, 25, 26, 29-30, 32 and 33, above, and in further view of Selbak (US 5425527), for the reasons cited in the previous Office Action, mailed December 7, 2005.

Luigi Grigoli et al. (Grigoli et al.) teach inclusions, such as nuts, on top of the ice cream, but is silent in teaching the cone contains such inclusions (Column 2, lines 56-61).

Selbak teaches inclusions are provided in ice cream cones as required by recipes (Abstract, Column 5, lines 48-67). Therefore, it would have been obvious to further modify Grigoli et al. and provide inclusions in the chocolate cone, depending on the particular chocolate recipe (e.g. chocolate with nuts) desired, since Grigoli et al. teach inclusions are desired as toppings on the ice cream. Selbak teaches ice cream cones may include inclusions depending on the

particular recipe of the ice cream cone, and chocolate recipes have been known to include nuts.

### ***Response to Arguments***

10. Applicant's arguments filed December 15, 2006 have been fully considered but they are not persuasive.
11. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In this case, Applicant argues that there is nothing in Grigoli to even suggest that a pattern design be placed on the chocolate shell and further that by positioning the wafer and upper portion of the chocolate shell in a paper envelope that there would be no advantage in appearance of Grigoli's product, since the consumer would only see the envelope or only a portion of the chocolate shell and a wafer cone and not the inner chocolate shell. The

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Examiner notes however, that Grigoli et al. teach wherein a chocolate shell is made and then subsequently inserted into a wafer. Therefore, the chocolate shell is actually also the cone for the ice cream (Column 1, Lines 6-15) and not just a means for maintaining the crispness of the wafer. On Column 1, line 15, Grigoli et al. disclose "the insertion of *the cone* into a **wafer**." One having ordinary skill in the art recognizes that Grigoli refers to the chocolate shell as the cone, which is subsequently inserted into a wafer. In addition to preserving crispness, one having ordinary skill in the art would have recognized that the wafer also serves as a means for holding the cone, since holding a chocolate cone directly in ones hand would cause said cone to melt.

Regarding the decorative pattern the Examiner asserts that Kuehl is relied on to teach a process for providing a marbled appearance to a fat based confectionery shell that is used to contain an ice cream or confectionery therein. Thus, both Grigoli and Kuehl teach a fat-based confectionery shell that holds ice cream therein. Regardless of whether the smoothing of the decorative marbling pattern is incidental or requires an additional step, Kuehl still teach wherein *the product* has a smooth marbled shell. Since Kuehl uses at least two types of chocolate having different colors, one having ordinary skill in the art would have recognized that the marbling provides an appealing design to the chocolate; however, it would have been further obvious that the combination of two different types of chocolate also impart a different taste to the chocolate shell. Thus, in addition to appearance, marbling the shell also changes the flavor of the shell.



Similarly, Grigoli et al. disclose decorating the product (Column 1, Line 65 to Column 2, Line 3); therefore Grigoli et al. recognize the need for providing product appeal and enhancing the taste of the product, through the use of said decorations. Thus, both Grigoli and Kuehl teach applying decorations that provide product appeal and enhanced flavor. Given the teachings of Grigoli et al. and Kuehl et al. it would have been obvious to one having ordinary skill in the art to modify Grigoli et al. to include a marbled chocolate shell, as taught by Kuehl et al. for the purpose of providing product appeal and an enhanced flavor to the frozen confection that results from the combination of different types of chocolate.

Regarding the Applicant's assertion that the packaging of Grigoli would prevent the consumer from seeing the chocolate shell, the Examiner asserts that Damato is relied on for this teaching. Although a portion of the cone of Grigoli is covered by the wafer, said cone also extends above the wafer. Damato provides the evidence that providing a transparent material for the package of Grigoli et al. would make the package of ice cream, in addition to the portion of the shell that extends above the wafer, visible to the customer without the need for the designs or descriptions of the contents, which are usually seen on opaque packaging. Given these teachings, it would have been obvious to one having ordinary skill in the art to modify Grigoli et al. to use a transparent packaging, as taught by Damato for the purpose of allowing the consumer to view the actual contents of the package as opposed to designs or descriptions. Additionally, such a

modification would allow the consumer to see the decorations already disposed on the top of Grigoli's ice cream product, thus further enhancing the appeal of the ice cream product of Grigoli. To one having ordinary skill in the art, the teachings of Damato are irrespective of whether the product is conical or any other shape, since Damato teach packaging means for ice cream products that allow the user to see the product directly. The above discussion, addresses the incorporation of the features of instant claim 7 into instant claim 1, which Applicant asserts would have overcome the rejection of instant claims 27 and 31.

Regarding the type of decorations, such as packaging adornments or the type of colors or type of design on the shell, the Examiner asserts that such limitations would not patentably differ from another shell having a different type of pattern or design. Thus, the type of decorations on the shell would not be a patentable feature over the prior art.

### ***Double Patenting***

12. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ

619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

13. Claims 1-4,8-10,25-30,32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,6,16,17,20 of copending Application No. 10/294,764 in view of Kuehl et al. (EP 0848910 A2) and Damato (EP 276333), for the reasons cited in the prior Office Action.

'764 claims a cone fat-based shell with a ice confectionery that extends beyond the shell having a decorative topping in a packaged sealed with a lid as recited in claims 1,25-28,and 32, but does not claim the cone is chocolate and cone includes the decoration in a pattern design comprising lines formed of a first layer of strings with second layer of a contrasting color as recited in claims 1,8-10 and 28, wherein the strings are pressed/flattened as recited in claim 2, the shell has a shiny in appearance as recited in claim 3, the pattern is maintained after removal of the package as recited in claim 4, and the ice confectionery is ice cream or sorbet as recited in claims 10 and 30. Additionally, '764 does not claim the entire packaging sleeve is transparent as recited in claim 1, made of

smooth clear plastic foil as recited in claim 29, and includes printed material or other adornments on the sleeve or lid as recited in claim 33.

Kuehl et al. also teach shells intended for holding ice confectioneries, such as ice cream or sorbet, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1).

Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that not only provides a package, which appears to be smooth, that allows the ice cream and cone to be visible to the consumer, but further provides a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line (See EPO and Derwent abstracts). Damato further teaches advertising on the sleeve (Figure 3).

Therefore, it would have been obvious to modify '764 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain

chocolate is applied that is shiny as recited in claims 1-3,9, 10 and 28, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1,2,9,10, and 28, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3. Given the teachings of Damato, it would have been obvious to modify '764 and utilize a transparent plastic smooth foil sleeve as recited in claim 1, such as the one taught by Damato, since Damato teaches a smooth clear sleeve that not only allows the ice confection and cone to be visible to the consumer but provides the further benefit of a liquid-tight package for good protection during sale and eating with improved handling due to an intended break line. It would have been further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of '764 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package.

This is a provisional obviousness-type double patenting rejection.

14. Claim 31 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3,6,16,17,20 of copending Application No. 10/294,764 in view of Kuehl et al. (EP 0848910 A2) and Damato (EP 276333), as applied to claims 1-4,8-10,25-30,32 and 33 above, further in view of Selbak (US 5425527), for the reasons cited in the prior Office Action.

'764 does not claim the cone contains inclusions. Selbak teaches inclusions are provided in ice confection cones as required by recipes (Abstract, Column 5 , lines 48-67). Therefore, it would have been obvious to further modify '764 and provide inclusions in the cone, depending on the particular recipe desired, since 'Selbak teaches ice confection cones may include inclusions depending on the particular recipe of the ice confection cone.

This is a provisional obviousness-type double patenting rejection.

15. Claims 1-4, 8-10 and 25-33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-9,19-27 of copending Application No. 10/385,177 in view of Kuehl et al. (EP 0848910 A2), for the reasons cited in the prior Office Action.

'177 differs from the present invention only in that '177 does not claim the line pattern is formed by strings that are pressed/flattened, as recited in claims 1 and 2.

Kuehl et al. also teach molded chocolate shells intended for holding ice cream including line patterns with contrasting colors. Kuehl et al. teach forming

the pattern lines by providing a first layer of strings and a second layer of a different color (e.g. first white and second plain chocolate) for the most interesting visual effects. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '177 and include a pattern line decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain, since Kuehl et al. teach a pattern decoration for chocolate shells that provides an attractive appearance with most interesting visual effects is formed with a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color). This is a provisional obviousness-type double patenting rejection.

16. Claims 1-4, 8-10, 25-31 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5, 10-14 of copending Application No. 10/800,222 in view of Kuehl et al. (EP 0848910 A2), for the reasons cited in the prior Office Action.

'222 claims a cone shaped fat-based shell comprising chocolate chip inclusions and containing ice cream that extends beyond the shell in a transparent plastic foil packaged as recited in claims 1, 8, 10, 25-27, 29-31, but does not claim the cone includes the decoration in a pattern design comprising

strings/lines of a first confection layer that are pressed/flattened to form a smooth surface and a second contrasting color confection layer as recited in claims 1,2,8-10 and 28, that is shiny in appearance as recited in claim 3, that the pattern is maintained after removal of the package as recited in claim 4.

Kuehl et al. also teach shells intended for holding ice cream, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g. white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1). Therefore, it would have been obvious to modify '222 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3,9, 10 and 28, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a



contrasting color), as recited in claims 1,2,9,10, and 28, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3.

This is a provisional obviousness-type double patenting rejection.

17. Claims 32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-5,10-14 of copending Application No. 10/800,222 in view of Kuehl et al. (US EP 0848910 A2) as applied to claims 1-4,8-10 and 25-31 above, further in view of Damato (EP 276333), for the reasons cited in the prior Office Action.

'222 does not claim the cone shaped sleeve includes a lid as recited in claim 32 or printed material or other adornments on the sleeve or lid as recited in claim 33.

Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that advantageously provides a liquid-tight package for good protection during sale and eating that includes a lid(See EPO and Derwent abstracts) Damato further teaches advertising on the sleeve (Figure 3).

Therefore, it would have been obvious to modify '222 and include a lid as recited in claim 32, since Damato teaches clear sleeve provides benefit of a liquid-tight package for good protection during sale and eating when combined with a lid. It would have been further obvious to provide printed material on the sleeve, as

recited in claim 33, depending on the intended use of the package of '222 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package.

This is a provisional obviousness-type double patenting rejection.

18. Claims 1-4, 8-10 and 25-31 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,7-14 of copending Application No. 10/984,914 in view of Kuehl et al. (EP 0848910 A2), for the reasons cited in the prior Office Action.

Regarding claims 1-4, 8-10 and 25-31, Application '914 differs from the present application only in that '914 does not claim the pattern of lines, different colors, or two different layers of the cone comprising the chocolate shell (i.e. chocolate chips present) comprise a first layer of strings that are pressed or flattened and a second confection layer of a contrasting color as recited in claims 1 and 2, that the shell has shiny in appearance as recited in claim 3, and that the pattern is maintained after removal of the package as recited in claim 4.

Kuehl et al. also teach shells intended for holding ice cream, and Kuehl et al. further teach the shells including different colored layers that offer the advantage of providing attractive marbled appearance without losing adherence between the two layers as found in the prior art. The ingredients may be fat based, provide a first layer of strings and a second layer of a different color (e.g.

white and plain chocolate) for the most interesting visual effects, which would result in shiny appearances since the method followed is the same as Applicant's method. Furthermore Kuehl et al. teach pressing and flattening the strings either by forcing air onto the surface of the strings or dragging a probe across the surface of the strings (Page 1, lines 10-55, Page 2, lines 3-56, Example 1).

Therefore, it would have been obvious to modify '914 and include a decoration in the chocolate cone wherein a first layer of strings is supplied in white chocolate, pressed/flattened by air or a probe, a second layer of plain chocolate is applied that is shiny as recited in claims 1-3, that maintains good definition as recited in claim 4, since Kuehl et al. teach chocolate shells provide an attractive appearance with most interesting visual effects when they include a pattern design comprising a first layer of string lines made of white chocolate that are pressed or flattened via air or probes, a second layer of plain chocolate (i.e. a contrasting color), as recited in claims 1 and 2, wherein the different colored layers do not separate, or are capable of maintaining the pattern as recited in claim 4, and a method of forming the shell similar to Applicant that results in a shiny appearance as recited in claim 3. This is a provisional obviousness-type double patenting rejection.

19. Claims 32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1-3,7-14 of copending Application No. 10/984,914 in view of Kuehl et al. (US EP 0848910

A2) as applied to claims 1-10,25-31 above, further in view of Damato (EP 276333), for the reasons cited in the prior Office Action.

'914 does not claim the cone shaped sleeve includes a lid as recited in claim 32 or printed material or other adornments on the sleeve or lid as recited in claim 33. Damato teaches a transparent plastic foil sleeve from an ice confection filled cone that advantageously provides a liquid-tight package for good protection during sale and eating that includes a lid(See EPO and Derwent abstracts) Damato further teaches advertising on the sleeve (Figure 3).

Therefore, it would have been obvious to modify '914 and include a lid as recited in claim 32, since Damato teaches clear sleeve provides benefit of a liquid-tight package for good protection during sale and eating when combined with a lid. It would have been further obvious to provide printed material on the sleeve, as recited in claim 33, depending on the intended use of the package of '914 (e.g. as a mercantile package), since Damato shows a mercantile package for sale including an ice confection filled cone includes printed material to identify the package.

This is a provisional obviousness-type double patenting rejection.

***Conclusion***

20. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 3171367 discloses ice cream products that are contained within a shell comprised chocolate, without a wafer; and wherein said ice cream and chocolate shell are subsequently wrapped in packaging such as paper, plastic coated paper, glassware and other non-porous material. US 2200956 discloses an ice cream cone that is comprised of only chocolate and wherein a pattern is stamped into the outer surface of the chocolate shell. Further disclosed is that any pattern or shape can be included onto the outer surface of the shell. US 1509194 discloses an edible container comprising a chocolate layer within the interior of the container. US 1587792 discloses transparent wrapping for a cone and an ice cream that extends from the cone. US 1615680, US 2167353 discloses coating the interior of a cone with a heavy chocolate coating. US 2108418 discloses a cone with a chocolate shell, wherein the ice cream extends above the shell. US 2176409, US 2457110 discloses a chocolate coating for an ice cream. US 5102672 discloses an outer packaging and a wafer cone and a hardened chocolate shell on which is placed the wafer cone.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



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